IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' MOTION IN LIMINE TO EXCLUDE IMPROPER EVIDENCE AND ARGUMENTS RELATING TO LACK OF EFFECT, JUSTIFICATION, REASONABLENESS, OR LACK OF INTENT

I. Introduction

The United States respectfully moves this Court, pursuant to Rules 104, 401, and 402 of the Federal Rules of Evidence, for an Order, with respect to Count I, in advance of trial of the Indictment prohibiting the Defendants from introducing evidence, either documentary or testimonial (including expert testimony), questioning any witness, or presenting any arguments to the jury (including in opening or closing statements) regarding: (1) any lack of effect of the charged conspiracy or any economic or other justification for the charged conspiracy, including the reasonableness of the bid prices submitted pursuant to the charged conspiracy; and (2) the Defendants' lack of intent to violate the law or bring about anticompetitive effects. For the reasons explained below, such evidence is irrelevant to the charges contained in Count I of the

Indictment under Rule 401 of the Federal Rules of Evidence and inadmissible under Rule 402 of the Federal Rules of Evidence. Simply put, the agreement is the crime. *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), *cert. denied* 444 U.S. 840 (1979).

II. Argument

A. Evidence Relating to Effects of or Justifications for the Conspiracy is Irrelevant Because Bid Rigging is *Per Se* Illegal

Under the Sherman Act, "[e]very contract, combination . . . or conspiracy, in restraint of trade . . ." is illegal. 15 U.S.C. § 1. Although the exact boundaries of the Act are not always clear, the Supreme Court has defined a certain group of agreements as so pernicious that they always violate the Act. *See United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."). These agreements – which are known as "*per se* illegal" – include agreements to rig bids. *See United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990); *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 449-50 (10th Cir. 1984).

When charged conduct is "*per se*" illegal, any potential justifications for the conduct become irrelevant. Because the agreement itself is illegal, it is irrelevant whether:

- the conspiracy had little or no effect;
- the resulting prices were reasonable; or
- the conspiracy was motivated by good intentions, business necessity, or a desire to benefit the public.

See United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927) (refusing to make legality of price fixing turn on whether prices were reasonable); *Suntar Roofing, Inc.*, 897 F.2d at 472-73 (evidence of reasonableness or justification for a *per se* violation was properly excluded); *Reicher,* 983 F.2d at 172 (inability to perform not relevant to determination of *per se* antitrust violation); *Brighton Bldg.*, 598 F.2d at 1105-06 (if the defendants knowingly participate in *per se* conspiracy, contentions that the violations were justified or the conspiracy was ineffective are irrelevant); *Continental Baking Co. v. United States*, 281 F.2d 137, 143-44 (6th Cir. 1960) ("[A]ny evidence of justification or reasonableness after such an agreement has been established is properly excluded in a Sherman Act case. . . . Once the defendants admits the agreement he may say no more for it is illegal per se.").[1] Thus, in the case of bid rigging, "[i]t is as if the

[1] *See also. United States v. Andreas*, 216 F.3d 645, 666 (7th Cir. 2000) (noting that *per se* violations always or nearly always restrict competition such that courts may dispense with requirement of economic evidence) (*citing Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979)); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1369 (6th Cir. 1988) (in Sixth Circuit jury instructions properly withdrew question of effect of *per se* violation); *United States v. Kahan & Lessin Co.*, 695 F.2d 1122, 1125 (9th Cir. 1982) (in Ninth Circuit jury properly instructed that procompetitive justification is not a defense in a *per se* case); *United States v. Koppers Co., Inc.,* 652 F.2d 290, 293 (2d Cir. 1981) (in Second Circuit jury instructions properly withdrew question of reasonableness of *per se* violation); *United States v. Azzarelli Constr. Co.*, 612 F.2d 292, 294 (7th Cir. 1979) (the *per se* rule obviates the need to inquire into the reasonableness of the restraint); *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970) (in Eighth Circuit failure of conspiracy does not justify *per se* violation).

Sherman Act read: 'An agreement among competitors to rig bids is illegal,'" *Brighton Bldg.*, 598 F.2d at 1106 (*quoting* government brief with approval). No justification for the illegal agreement is relevant.

Because these justifications are irrelevant, the admission of such evidence and arguments would severely prejudice the United States' and the public's right to a trial that is limited to determining whether or not the defendants committed the violation charged in the Indictment. Indeed, the Supreme Court in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), highlighted the danger to enforcement of the Sherman Act if trial courts were to admit evidence of ostensible justifications for *per se* violations:

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

310 U.S. at 221. Accordingly, the United States seeks an order precluding the Defendants from attempting to excuse their illegal conduct with these irrelevant justifications.

B. Evidence That Defendants Did Not Intend to Violate the Law or Restrain Trade Is Not Relevant.

While intent is an element of a Sherman Act offense, *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978), it is well established that in a criminal prosecution of a Sherman Act conspiracy such as the bid rigging conspiracy alleged in Count One of the

Indictment, the United States need not prove that the defendants intended to restrain trade or violate the law. *Suntar*, 897 F.2d at 472; *Metro. Enters., Inc.*, 728 F.2d at 449-50.[2]

In cases involving *per se* violations of the Sherman Act, proof of the defendants' knowing participation in an agreement to rig bids satisfies the intent requirement. The United States is not arguing that the Sherman Act is a strict liability crime. Intent is an element of a Sherman Act violation. However, the intent required to prove a criminal violation of the Sherman Act is simply the general intent to agree to rig bids, not a specific intent to restrain trade or violate the law. *See United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 533 (4th Cir. 1985) ("Therefore, the trial court correctly instructed the jury that the government must prove the defendants' intentional participation in the conspiracy to rig bids. The government did not have to prove the defendants' specific intent to unreasonably restrain trade.") (citation omitted); *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 465 (4th Cir. 1979) ("Since in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of price-fixing agreement establishes the defendants' illegal purpose. . . .").

The Defendants in this case may not defend or excuse their knowing participation in the charged conspiracy by arguing or offering evidence that they did not intend to violate the law or

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[2] *See also Coop. Theatres*, 845 F.2d at 1373; *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1161-62 (4th Cir. 1986); *United States v. Cargo Service Stations, Inc.,* 657 F.2d 676, 683-84 (5th Cir. 1981); *Koppers*, 652 F.2d at 295-96 n.6; *Brighton Bldg.,* 598 F.2d at 1106; *United States v. Gillen*, 599 F.2d 541, 545-46 (3rd Cir. 1979) *cert. denied*, 444 U.S. 866 (1979).

restrain competition. This proof would be nothing more than an excuse or justification for participating in the *per se* unlawful conduct and "would reopen the very questions of reasonableness which the per se rule is designed to avoid." *Koppers*, 652 F.2d at 296 n.6. Accordingly, when a defendant knowingly engages in *per se* unlawful conduct, intent to restrain trade is presumed. *See Coop. Theatres*, 845 F.2d at 1373; *Gillen*, 599 F.2d at 545.

Therefore, because proof of specific intent to restrain trade is not germane to a determination of the defendants' guilt or innocence, with respect to Count One of the Indictment evidence or arguments regarding the absence of specific intent is irrelevant as a matter of law within the meaning of Rule 401 of the Federal Rules of Evidence and thus and should be excluded under Rule 402.[3]

III. Conclusion

The bid rigging conspiracy charged in Count One of the Indictment, if proven, constitutes a *per se* violation of Section 1 of the Sherman Act. The Supreme Court, the Tenth Circuit and other federal courts have consistently held that there is no justification for *per se* violations of the Sherman Act. Evidence and arguments that the charged bid rigging conspiracy was ineffective, that the prices charged by the conspirator companies were reasonable, that customers, in this case, BP America Production Company, were not harmed, that the conduct at issue was

[3] Likewise, whether the defendants knew about the Sherman Act and its prohibition on bid rigging is irrelevant and any ignorance on their part is inadmissible as a defense. "The general rule that ignorance of the law or a mistake of the law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991) (*citations omitted*).

somehow justified, or that the defendants did not intend to violate the law or restrain competition are irrelevant.

For all of the reasons stated herein, and pursuant to Rules 104, 401, and 402 of the Federal Rules of Evidence, the United States respectfully requests that the Court enter an Order prohibiting Defendants from introducing evidence, either documentary or testimonial (including expert testimony), questioning any witness, or offering any arguments to the jury (including opening or closing statements) regarding: (1) any lack of effect of the charged conspiracy or any economic or other justification for the charged conspiracy, including the reasonableness of the bid prices submitted pursuant to the charged conspiracy; and (2) the Defendants' lack of intent to violate the law or bring about anticompetitive effects.

Respectfully Submitted,

s/Diane C. Lotko-Baker
DIANE C. LOTKO-BAKER
s/Carla M. Stern
CARLA M. STERN
s/Mark D. Davis
MARK D. DAVIS
Attorneys, Antitrust Division
U.S. Department of Justice
Midwest Field Office
209 S. LaSalle Street
Chicago, IL 60604
Tel.: (312) 353-7530
diane.lotko-baker@usdoj.gov
carla.stern@usdoj.gov
mark.davis3@usdoj.gov

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I electronically filed the United States' Motion in Limine to Exclude Improper Evidence and Arguments Relating to Lack of Effect, Justification, Reasonableness, or Lack of Intent with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

hhaddon@hmflaw.com

pmackey@hmflaw.com

patrick-j-burke@msn.com

markjohnson297@hotmail.com

I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane C. Lotko-Baker
DIANE C. LOTKO-BAKER
s/Carla M. Stern
CARLA M. STERN
s/Mark D. Davis
Attorneys, Antitrust Division
U.S. Department of Justice
Midwest Field Office
209 S. LaSalle Street
Chicago, IL 60604
Tel.: (312) 353-7530
diane.lotko-baker@usdoj.gov
carla.stern@usdoj.gov
mark.davis3@usdoj.gov